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No. 94-949

Supreme Court, U.S.
FILED
JAN 26 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

LINDA M. GREENBLATT,

Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

LINDA M. GREENBLATT,

Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two district courts enforced class action settlement orders that barred a class member who chose to stay in the class and cash her settlement checks from prosecuting her dismissed class action claims in arbitration. The Court of Appeals held that the district court orders were not an abuse of discretion. Should the Court review the Court of Appeals' decision, given that:

(1) The decision does not conflict with any decision of any other federal circuit court or any state court of last resort;

(2) The decision raises no substantial federal issue;

(3) The decision is unpublished and may not be cited as precedent in the Ninth Circuit; and

(4) The legal issues sought to be reviewed are well-settled?

TABLE OF CONTENTS

Page

INTRODUCTION 2

STATEMENT OF THE CASE 2

1. The Radisson Plaza Class Action 2

2. The Stamford Towers Class Action 5

3. The Arbitration 6

4. The Orders Enforcing the Settlements 10

5. The Appeal 11

SUMMARY OF ARGUMENT 12

ARGUMENT 13

I. THIS CASE DOES NOT MEET THE CRITERIA FOR CERTIORARI UNDER SUPREME COURT RULE 10 13

A. THERE IS NO CONFLICT IN DECISIONS 13

B. THERE IS NO SUBSTANTIAL FEDERAL QUESTION TO REVIEW 14

II. THE LEGAL ISSUES PETITIONER RAISES ARE WELL-SETTLED 16

A. THE COURT BELOW APPLIED THE PROPER STANDARD OF REVIEW 16

B. THE DECISION OF THE COURT BELOW AFFIRMING THE INHERENT AUTHORITY OF FEDERAL COURTS TO ENFORCE THEIR OWN INJUNCTIONS DOES NOT CONTRAVENE THE FEDERAL ARBITRATION ACT 17

C. EVEN IF SHEARSON HAD AGREED TO ARBITRATE THESE CLAIMS, THE DISTRICT COURTS HAD AUTHORITY TO ENFORCE THEIR OWN JUDGMENTS 19

TABLE OF CONTENTS – Continued

Page

D. PETITIONER'S REMAINING ARGUMENTS LACK MERIT 22

E. THE SETTLEMENT NOTICES SATISFIED CONSTITUTIONAL REQUIREMENTS 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) 16

Bennett v. Behring Corp., 96 F.R.D. 343 (S.D. Fla. 1982) 24

Callie v. Near, 829 F.2d 888 (9th Cir. 1987) 16

Delta Air Lines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 582 (11th Cir. 1983) 20

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) ..24, 25

Halley Optical Corp. v. Jagar Int'l Marketing Corp., 752 F. Supp. 638 (S.D.N.Y. 1990) 23

Hartley v. Stamford Towers Limited Partnership, et al., C-90-2146-JPV ..... *passim*

In re Four Seasons Securities Laws Litigation, 525 F.2d 500 (10th Cir. 1975) 25

In re VMS Securities Litigation, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd*, 21 F.3d 139 (7th Cir. 1994) 21, 23

Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067 (11th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 600 (1993) 20, 21

Kinnear-Weed Corp. v. Humble Oil & Refining Co., 441 F.2d 631 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971) 20

Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977) 24

Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) 24

TABLE OF AUTHORITIES – Continued

Page

Multnomah Legal Services Workers Union v. Legal Services Corp., 936 F.2d 1547 (9th Cir. 1991) 16

Nielsen v. Greenwood, Fed. Sec. L. Rep. (CCH) 97,408 (N.D. Ill. 1993) 19

PaineWebber Inc. v. Hartmann, 921 F.2d 507 (3d Cir. 1990) 23

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 20

Sullivan v. Shearson California Radisson Plaza Partners Limited Partnership, et al., Case No. 89-5472-JMI ..... *passim*

Wilkinson v. Federal Bureau of Investigation, 922 F.2d 555 (9th Cir. 1991) 16

STATUTES

15 U.S.C. § 78j 6

17 F.R.D. § 240.10b-5 6

28 U.S.C. § 1651 ..... 20, 21

Federal Arbitration Act, 9 U.S.C. § 2 17

Federal Rule of Civil Procedure 23 19

RULES AND REGULATIONS

NASD Code of Arbitration Procedure, Section 12(d) (as amended October 28, 1992) 15, 22

NASD Code of Arbitration Procedure, Section 25(b) 9

Ninth Circuit Rule 36-2 14

TABLE OF AUTHORITIES – Continued

Page

Supreme Ct. Rule 10 13

Supreme Ct. Rule 10.1(a) 13, 15

Supreme Ct. Rule 10.1(b) 14

Supreme Ct. Rule 10.1(c) 13, 14

Supreme Ct. Rule 14(j) 13

Supreme Ct. Rule 29.1 2

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INTRODUCTION

There is nothing to review here. It is well-settled that district courts have broad authority to enforce their own prior injunctions. It is also well-settled that class members who choose to accept a settlement payment rather than opt out of the class may not subsequently relitigate their settled class action claims in arbitration or any other forum.

In short, the legal issues raised by this case are not new or unsettled. There is no conflict between the decision below and any other federal or state decision. Nor is this unpublished decision important enough to merit review by this Court. The Petition should be denied.

STATEMENT OF THE CASE

1. The Radisson Plaza Class Action

On August 28, 1989, a securities class action was filed in the Central District of California against Respondent Shearson Lehman Hutton Inc. ("Shearson")[1] and others

[1] Pursuant to Supreme Court Rule 29.1, Shearson states that, after this litigation commenced, Primerica Inc. and Smith Barney, Harris, Upham & Co. ("Smith Barney") acquired the asset management and certain retail operations of Shearson Lehman Brothers Inc., formerly known as Shearson Lehman Hutton Inc. (excluding the retail operations of Lehman Brothers Inc.). Primerica Inc. merged subsequently with The Travelers Inc. The Travelers Inc., a public company whose shares are traded on the New York Stock Exchange, is the parent company of Smith Barney Holdings Inc., which in turn is the parent company of Smith Barney. Smith Barney has no subsidiaries

asserting claims arising from the purchase of units in the Shearson California Radisson Plaza Limited Partnership ("Radisson Plaza"). *Sullivan v. Shearson California Radisson Plaza Partners Limited Partnership, et al.*, Case No. 89-5472-JMI (*"Sullivan"*). The class action was based, in part, on alleged misrepresentations regarding the Radisson Plaza investment in the written prospectus and various advertisements. The complaint also alleged that Shearson and its selling agents misrepresented that Radisson Plaza was a safe and secure investment "appropriate for individual retirement accounts, pension and profit sharing plans and fixed income investors."

On May 31, 1990, District Judge James Ideman preliminarily approved a $5.5 million settlement of the class action, and approved the form of notice to be sent to all class members. In June 1990, notice of the proposed settlement was sent to Petitioner, who was a Radisson Plaza investor and a member of the class. The notice summarized the class action and the settlement, and listed each claim alleged in the case, which was generally described as "arising out of the offer and sale of the Units" in Radisson Plaza. The notice advised Petitioner that she could address any questions to class counsel, or could seek the advice of her own attorney. Most important, the notice informed Petitioner that she could examine the actual pleadings and records in the class action, including the complete Settlement Agreement, at any time.

The notice further informed Petitioner that she had a right to be excluded from the class, and warned her that,

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(other than wholly-owned subsidiaries).

if she remained a class member, she would benefit from *and be bound by* the results of the class action lawsuit:

> By remaining a class member, any claims against the defendants for damages arising from the defendants' conduct as alleged by the Class will be determined in this lawsuit *and cannot be presented by you in any other lawsuit*. . . .

Finally, the notice listed the time and place of the approval hearing, and informed Petitioner of her right to attend the hearing or submit written objections to the settlement.

Upon receiving this notice, Petitioner had two choices: agree to be bound by the settlement and collect her share of the settlement fund, thereby releasing all claims regarding her Radisson Plaza invesment, or opt out of the class and pursue her claims against Shearson on her own. She chose to take the money, and cashed Shearson's settlement checks for $1,370.

On July 16, 1990, Judge Ideman approved the settlement and entered final judgment. The judgment provided that Petitioner and the other class members were "severally and permanently enjoined and barred from instituting or further prosecuting *any action or proceeding in any court or tribunal* of this or any other jurisdiction based upon any claim that is a Settled Claim . . . all of which claims are hereby declared to be released, discharged, compromised, settled, and extinguished." "Settled Claims" were defined as:

> any and all existing causes of action or claims, known or unknown, that have been *or could have been* asserted by Plaintiffs against the Settling

> Defendants, *based upon or related to: (i) an investment in Radisson Securities, or (ii) the facts, transactions, events, occurrences, acts or omissions which relate to any of the matters alleged in the Radisson Actions.*

The Settlement Agreement defined "Settling Defendants" to include Shearson and its employees. Petitioner did not challenge the settlement or entry of judgment. Judge Ideman expressly retained jurisdiction to enforce the settlement and injunction.

2. The Stamford Towers Class Action

Two weeks later another securities class action was filed in the Northern District of California against Shearson, among others. *Hartley v. Stamford Towers Limited Partnership, et al.*, C-90-2146-JPV (*"Hartley"*). The class asserted claims arising from the purchase of Stamford Towers Limited Partnership units ("Stamford Towers"). Like *Sullivan*, the *Hartley* case was based, in part, on alleged misrepresentations regarding the Stamford Towers investment in the written prospectus, sales brochures, and oral "sales pitches." The class alleged that Shearson and its selling agents misrepresented Stamford Towers to be a secure investment "appropriate for investors seeking capital appreciation, cash distributions and investment safety."

In an order entered *nunc pro tunc* as of May 9, 1991, District Judge John Vukasin, Jr. preliminarily approved a $6.5 million settlement of the *Hartley* action, and approved the form of notice to be sent to class members,

including Petitioner, who was an investor in Stamford Towers and a member of the class.

3. The Arbitration

On May 20, 1991, a year after *Sullivan* was settled and nearly a year after *Hartley* was filed, Petitioner filed an arbitration proceeding with the National Association of Securities Dealers ("NASD") against Shearson and her Shearson broker, Kenneth Silva. Her arbitration claims involved almost 200 different investments, two of which were Radisson Plaza and Stamford Towers. Petitioner admits that her investments in Stamford Towers and Radisson Plaza represented a relatively small percentage of her total claimed damages in arbitration.

Like the *Sullivan* and *Hartley* complaints, Petitioner's arbitration complaint alleged violations of § 10(b) and Rule 10b-5, fraud, negligent misrepresentation, and negligence. Petitioner also alleged that her broker, Silva, advised her to invest in Stamford Towers and Radisson Plaza although the investments were not liquid and were excessively speculative. This allegation matches those made in *Sullivan* and *Hartley* that Shearson brokers misrepresented that these units were "appropriate" or "suitable" investments. Petitioner herself recognized the similarity, as her arbitration complaint alleges that her limited partnership investments were "financially distressed *and/or the subject of class action lawsuits.*"

One month after Petitioner filed her arbitration complaint, she received notice of the class action settlement in *Hartley*. Like the notice in *Sullivan*, the *Hartley* notice

summarized the class action and the settlement, advised Petitioner that she should address any questions to class counsel or consult her own attorney, and informed her of her right to see the pleadings in the case, including the full Settlement Agreement. The notice listed the causes of action alleged in the case, and described them as "arising out of, among other claims, [Shearson's] services as selling agent in connection with the offer and sale of the Units" in Stamford Towers.

The notice informed Petitioner of her right to be excluded from the class, and of the consequences of failing to opt out:

> By remaining a class member, any claims against the Defendants for damages arising from the Defendants' conduct as alleged by the Class Action Complaint will be determined in this lawsuit *and cannot be presented by you in any other lawsuit* . . .
>
> If you remain a member of the Class: *You will be bound by all further orders and judgments of the Court.*

Finally, the notice informed her of her right to attend the approval hearing or to submit written objections to the settlement.

Once again, Petitioner faced the choice of cashing her settlement check and releasing her claims, or opting out and pursuing her claims against Shearson. This time, however, she did not face that choice alone. When she received this notice, Petitioner was represented by her current counsel, and was actively pursuing her arbitration claims against Shearson. Yet she did not opt out of

the class, or object to the settlement. Instead, she cashed Shearson's settlement check for $23,168.[2]

On July 11, 1991, Judge Vukasin approved the settlement and entered final judgment. The judgment provided that Petitioner and the class were "severally and permanently enjoined and barred from instituting or further prosecuting *any action or proceeding in any court or tribunal* of this or any other jurisdiction *based on any claim that is a Settled Claim* . . . all of which claims are hereby declared to be released, discharged, compromised, settled and extinguished." "Settled Claims" were defined as:

> any and all existing causes of action or claims, known or unknown, that have been *or could have been* asserted by Plaintiffs against Defendants, *based upon or related to investments in the Units* of limited partnership interest in *Stamford Towers Limited Partnership* or the matters alleged in the Hartley action, including claims for breach of fiduciary duty, negligence, breach of contract, *or any other alleged claim arising in connection with* the development, construction and operation of the Partnership and its assets or as a result of, among other things, *defendant Shearson Lehman Hutton, Inc.'s services as a selling agent in connection with the offer and sale of the Units of limited partnership interest in Stamford Towers Limited Partnership* as set forth in the Prospectuses.

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[2] Petitioner's attempt to have it both ways by cashing her settlement check with an endorsement that it was without prejudice to her arbitration claims was judged to be an invalid objection to the settlement by the district court. Appendix, at A-33. Petitioner did not challenge this ruling on appeal.

The Settlement Agreement defined "Defendants" to include Shearson and its employees.

Again, Petitioner never challenged the settlement or appealed the judgment. Judge Vukasin expressly retained jurisdiction to enforce the settlement and injunction.

Although she had cashed Shearson's settlement checks in both *Sullivan* and *Hartley*, Petitioner continued to press her released Radisson Plaza and Stamford Towers claims in arbitration. Because her assertion of these claims in arbitration was in direct violation of the *Sullivan* and *Hartley* injunctions, Shearson timely answered the arbitration complaint on September 20, 1991, and simultaneously moved to dismiss the Radisson Plaza and Stamford Towers claims. In its Answer, Shearson expressly preserved its objection to the arbitrability of the Radisson Plaza and Stamford Towers claims. The Answer stated: "Greenblatt is a member of the classes and therefore, cannot pursue any claims related to [the Radisson Plaza or Stamford Towers limited partnerships] in this lawsuit."

While its motion to dismiss was pending, Shearson participated in the arbitration process with respect to Petitioner's other, non-released claims, which comprised the majority of her claimed damages. Appendix, at A-14 n.1.[3] As required by Code of Arbitration Procedure Section 25(b), Shearson and Silva executed form Submission

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[3] Citations in this brief to the Appendix submitted by Petitioner are designated as "App." followed by the page number. Citations to the Petition For Writ of Certiorari itself are designated as "Petition."

Agreements. The Submission Agreements contained a clear limitation on what was being submitted to arbitration: "the present matter in controversy, as set forth in the attached statement of claim *and answers*. . . . " App. A-60; A-64. Because Shearson expressly noted in its Answer that the Radisson Plaza and Stamford Towers claims were *not* arbitrable, the Submission Agreements did not submit those claims to arbitration.

The Director of Arbitration referred Shearson's motion to dismiss to a hearing before a panel of arbitrators, but several months went by without a panel being appointed. As the arbitration date approached, Shearson withdrew its motion without prejudice, and sought relief from the district courts.

4. The Orders Enforcing the Settlements

In August 1992, Shearson filed a motion to enforce the Stamford Towers judgment and enjoin Petitioner from relitigating her dismissed claims in arbitration. On October 5, 1992, the district court granted the motion. App. A-29. The court held that Petitioner, as a class member, was bound by the settlement and injunction. App. A-33. The court held that Shearson had not waived either its right, or the court's authority, to enforce the judgment and injunction by participating in the arbitration. App. A-34. In so ruling, the court noted that Shearson had asserted that the Stamford Towers claims were barred from the inception of arbitration. App. A-34. Accordingly, the court held that Petitioner was permanently enjoined

and barred from further arbitrating her Stamford Towers claims. App. A-35.

On October 5, 1992, Shearson filed a similar motion to enforce the *Sullivan* settlement and injunction.[4] On November 9, 1992, the court granted that motion. App. A-37. The court held that Petitioner chose to remain a class member, and had ratified the settlement by cashing Shearson's settlement checks. App. A-44. Finally, the court found that, by participating in the arbitration process, Shearson had not waived its right or the court's authority to enforce the *Sullivan* judgment and injunction. App. A-47. Accordingly, the court held that Petitioner was "permanently enjoined and barred" from arbitrating her Radisson Plaza claims. App. A-49.

5. The Appeal

Petitioner appealed both orders, and the Ninth Circuit affirmed. The court held that the district courts did not abuse their broad discretion to enforce their own judgments. App. A-12. It also upheld the findings that Shearson had not waived its right to seek judicial enforcement of the settlements, and that the settlement notices were adequate to fairly apprise class members of the nature of the suits, the terms of the settlements, and their opportunity to be heard. App. A-24-25.

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[4] Prior to filing its motion to enforce the settlement and injunction, Shearson filed an *ex parte* application seeking a temporary restraining order enjoining Petitioner's arbitration of her dismissed Radisson Plaza claims. The court denied the *ex parte* application, but expressly invited Shearson to submit a fully noticed motion to enforce the settlement agreement. App. A-59.

Petitioner did not seek rehearing by the Ninth Circuit. Instead, she seeks review by this Court.

SUMMARY OF ARGUMENT

The Court should refuse to grant review of this decision for these reasons:

1. Petitioner has made no showing that this unpublished decision meets the criteria for certiorari provided in Supreme Court Rule 10, nor could such a showing be made here. There is no conflict of decisions and no substantial federal question to review.

2. The legal issues raised by Petitioner are well-settled. The law is clear with respect to the preclusive effects of class action settlements, the adequacy of class notices, and the district courts' authority to enforce their own judgments and injunctions. Petitioner provides no legal authority to support her claim that she may pursue settled class action claims in arbitration after accepting the benefits of a class action settlement and releasing those claims. Indeed, both the Third and Eleventh Circuits have published decisions that reject Petitioner's position.

3. Even if the court below erred, this case does not merit review, because Petitioner's claims are indisputably precluded from arbitration regardless of the outcome here.

ARGUMENT

I. THIS CASE DOES NOT MEET THE CRITERIA FOR CERTIORARI UNDER SUPREME COURT RULE 10

Petitioner fails to present a single viable reason why this Court should review this case. Petitioner's only stated basis for seeking review is that the court below got it wrong. Of course, if that were a criterion for granting review, there would be no case that did not qualify, in the opinion of one of the parties.

However, that is not a criterion. Supreme Court Rule 10 provides a representative list of the types of cases this Court will consider on a writ of certiorari. None of those circumstances are present here. Nor has Petitioner even argued that they are, despite the fact that Supreme Court Rule 14(j) expressly requires a "direct and concise argument amplifying the reasons relied on for the allowance of the writ" pursuant to Rule 10.

The reason for Petitioner's omission of such a "direct and concise argument" is simple: This case does not meet any of the criteria for certiorari.

A. THERE IS NO CONFLICT IN DECISIONS

This case presents no split of authority between two federal appellate courts, or between a federal appellate court and this Court. Supreme Ct. Rule 10.1(a), (c). Indeed, the Third and Seventh Circuits have published opinions that directly support the Ninth Circuit decision here. In fact, Petitioner has not found a *single* federal decision, district court *or* appellate, that supports her position that class members who release their claims and

accept a settlement payment can later prosecute those released claims in arbitration.

Not only are there no *federal* cases that support Petitioner's position, there are no *state* court decisions that do. Thus, this case does not present any conflict between a decision of a state court of last resort and another state or federal appellate court. Supreme Ct. Rule 10.1(b).

B. THERE IS NO SUBSTANTIAL FEDERAL QUESTION TO REVIEW

Nor does this case present any "important question[s] of federal law which [have] not been, but should be, settled by this Court." Supreme Ct. Rule 10.1(c). Again, Petitioner does not claim this is such a case. Had she thought to make such a claim, however, she would have been wrong. Indeed, the court below did not find its decision important enough for publication. Ninth Circuit Rule 36-2(d).[5] As a result, it cannot be cited or relied on in the Ninth Circuit or any district court in that Circuit. Ninth Circuit Rule 36-2.

This case lacks significance for another reason. Even if this Court were to grant review and agree with Petitioner that the arbitrability of these claims should be decided by the arbitrators, rather than the district courts,

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[5] Indeed, the court below refused to publish the decision even after Shearson requested that it do so. In making its request, however, Shearson did not claim any important federal questions were involved. In fact, Shearson noted that the decision reinforced "established law," and, if published, would be important only because it would prevent the spurious relitigation of dismissed class action claims in arbitration.

her claims would still be precluded. Indeed, Petitioner never argues that her Stamford Towers and Radisson Plaza claims are *not* precluded by the class action settlements and injunctions. She simply argues that she did not *realize* they were precluded, and that the wrong people were allowed to tell her that her claims were barred.

Petitioner's whole argument seems to be that the *arbitrators*, not the district courts, should be allowed to tell her that she may not arbitrate her released class action claims. Petitioner concedes that amendments to the NASD Code of Arbitration Procedure, which became effective *after* the district court orders barring Petitioner's claims were issued, make it crystal clear that "[a]ny claim filed by a member or members of a putative or certified class action is . . . ineligible for arbitration at the Association if the claim is encompassed by a putative or certified class action filed in federal or state court." NASD Code of Arbitration Procedure, Section 12(d) (as amended October 28, 1992). Though these amendments were enacted too late to help Shearson, they presumably will apply to any proceeding before the NASD on remand. Thus, Petitioner's claims are precluded. Period. Accordingly, if there were an important federal question here, which there is not, this would not be the case to address it.[6]

Moreover, this rule also settles the issue for all future cases, so there is no need for the Court to act. The

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[6] Petitioner does not suggest, nor could she, Rule 10's other ground for review, that the courts here "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Ct. Rule 10.1(a).

problem Petitioner complains of here should not come up again. Thus, reviewing this case would not be time well spent.

II. THE LEGAL ISSUES PETITIONER RAISES ARE WELL-SETTLED

In addition to the fact that this case raises no important federal question, the legal issues involved here are well-settled, and simply do not merit review by this Court.

A. THE COURT BELOW APPLIED THE PROPER STANDARD OF REVIEW

First, Petitioner claims the court below applied the wrong standard of review. She asserts that the scope of arbitration clauses should be reviewed *de novo*. But the standard of review applicable to arbitration clauses is not the issue. The orders from which Petitioner appealed are orders enforcing the *Sullivan* and *Hartley* settlements and injunctions. The district court's enforcement of a settlement agreement is reviewed for an abuse of discretion. *Wilkinson v. Federal Bureau of Investigation*, 922 F.2d 555, 558 (9th Cir. 1991); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987). Likewise, the district court's grant of a permanent injunction is reviewed for an abuse of discretion. *Multnomah Legal Services Workers Union v. Legal Services Corp.*, 936 F.2d 1547, 1552 (9th Cir. 1991); *Beaton v. Thompson*, 913 F.2d 701, 702 (9th Cir. 1990). The abuse of discretion standard applied by the court below was undoubtedly correct.

B. THE DECISION OF THE COURT BELOW AFFIRMING THE INHERENT AUTHORITY OF FEDERAL COURTS TO ENFORCE THEIR OWN INJUNCTIONS DOES NOT CONTRAVENE THE FEDERAL ARBITRATION ACT

Next, Petitioner asserts that the court below somehow created an improper "judicial exception" to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, by affirming the district courts' enforcement of the *Sullivan* and *Hartley* class action settlements and injunctions. In fact, there was no agreement to arbitrate the settled claims. To conjure up such an agreement, Petitioner must ignore both the fact that she was judicially enjoined from arbitrating her released Stamford Towers and Radisson Plaza claims in the first place, and the fact that Shearson never "agreed" to arbitrate those claims.

In order to bring this case within the confines of the FAA, Petitioner asserts that the court below erred in failing to find that Shearson agreed to arbitrate the arbitrability of the Stamford Towers and Radisson Plaza claims. But the court below was right. Shearson never made such an agreement. In claiming that it did, Petitioner's argument is circular: Because Shearson first raised its preclusion defense in arbitration and participated in arbitration before seeking relief in the district court, Shearson "agreed" to arbitrate the arbitrability of those claims. Petition, at 45-50. This defies the facts and common sense.

As the court below correctly noted, Shearson's Answer in arbitration expressly preserved its objection that the Radisson Plaza and Stamford Towers claims were

precluded and barred. App. A-10. The Submission Agreements, which Shearson was required by NASD rules to submit in order to proceed with the remainder of Petitioner's arbitration claim, contained a clear limitation on what Shearson was agreeing to submit to arbitration: "the present matter in controversy, as set forth in the attached statement of claim *and answers*. . . . " App. A-60; A-64. Shearson stated in its Answer that Petitioner's Radisson Plaza and Stamford Towers claims were *not* arbitrable. Thus, the Submission Agreements did *not* submit the arbitrability of Petitioner's released claims to arbitration.

In any event, the interpretation of disputed submission agreements presents a fact-specific question peculiar to this case, not an issue of widespread and continuing interest. This is another reason the Court should decline to review the decision below.

After mischaracterizing Shearson's conduct as an agreement to arbitrate, Petitioner engages in a lengthy discussion of the federal policy favoring arbitration which is entirely beside the point. Petition, at 30. Equally irrelevant is her discussion of the legal standard for determining arbitrability when claim preclusion is *not* an issue. Petition, at 31-40. None of the cases Petitioner cites for determining whether a dispute is arbitrable involved an attempt to arbitrate settled and released claims. The issue is not whether courts tend to encourage arbitration or rigorously enforce agreements to arbitrate. The issue is whether the courts that enjoined Petitioner from arbitrating her settled class action claims here had authority to enforce those injunctions and properly did so. In the absence of any agreement to arbitrate the impact of the

class action settlements, Petitioner has no viable argument that the district courts erred in enforcing their own injunctions.

C. EVEN IF SHEARSON HAD AGREED TO ARBITRATE THESE CLAIMS, THE DISTRICT COURTS HAD AUTHORITY TO ENFORCE THEIR OWN JUDGMENTS

Even if Shearson *had* agreed to arbitrate the question of whether Petitioner's Stamford Towers and Radisson Plaza claims were barred, which it did not, the district courts properly enforced the *Sullivan* and *Hartley* injunctions with respect to these claims. As Petitioner notes, the FAA provides that a written agreement to submit a controversy to arbitration is valid and enforceable absent legal or equitable grounds for its revocation. However, Petitioner's own cases hold that an agreement to arbitrate statutory rights will not be enforced where the statutory rights at issue (here, a district court's power to enforce its own injunction) give rise to "an inherent conflict between arbitration and the statute's underlying purposes."[7] *See,*

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[7] On this point, Petitioner notes that one court has ruled that there is no "inherent conflict" between Federal Rule of Civil Procedure 23, which governs class actions, and the FAA. *Nielsen v. Greenwood*, Fed. Sec. L. Rep. (CCH) ¶ 97,408 (N.D. Ill. 1993). However, the issue in *Nielsen* was whether two investors who had agreed to arbitrate claims against an underwriter could assert the policy favoring class actions to invalidate their arbitration agreements. The court held that they could not. That holding has no bearing on the inherent conflict between allowing arbitration of enjoined claims and a court's broad authority to enforce its own injunction.

e.g., Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987). Thus, any such "agreement" would be unenforceable in light of the inherent conflict between such an agreement and the expansive language of 28 U.S.C. § 1651.

Section 1651 grants the federal courts broad injunctive power to protect their own judgments. 28 U.S.C. § 1651; *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 600 (1993); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971). Under Section 1651, federal courts have the power to issue *"all writs necessary or appropriate* in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (emphasis added). This power rests with the court, not the litigants, and is not limited to relief the parties may request. *See, e.g., Delta Air Lines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir. 1983) (district court can best determine whether its judgment is threatened by subsequent litigation, and is thus empowered to enjoin arbitration proceedings that jeopardize its prior judgment regardless of a party's action or inaction). Thus, this power is independent from, and unaffected by, the FAA. A district court acting to enforce its own judgment and injunction, and an appellate court that affirms such an act, are not creating an "exception" to anything.

Thus, Petitioner is wrong when she suggests that parties can agree to arbitrate claims that a federal court has ordered enjoined and barred merely because there is a federal policy favoring arbitration. To adopt such a rule would raise an inherent conflict between arbitration and

the authority of the court, and would eviscerate Section 1651's express purpose of providing federal courts with the power to do whatever is necessary or appropriate to enforce their own judgments.

This broad authority clearly includes the power to enjoin arbitration proceedings. As a general principle, the district court's injunctive power specifically includes the authority to enjoin arbitration to prevent relitigation of claims. *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 600 (1993). And more to the point, the district court's jurisdiction to enforce the terms of a class action settlement includes the power to enjoin further prosecution of settled claims by class members in arbitration proceedings.

This rule is illustrated by *In re VMS Securities Litigation*, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd*, 21 F.3d 139 (7th Cir. 1994). In the *VMS* case, the district court granted defendant's motion to enforce a class action settlement despite the fact that the defendant had already litigated the matter in arbitration, unsuccessfully raised the defense that the arbitration claims were precluded by the class action settlement, and then proceeded on the merits and lost the arbitration. The district court ruled that it retained jurisdiction to enforce its class action judgment and settlement agreement and enjoined the customer from enforcing the arbitration award. The Seventh Circuit affirmed, and held in addition that the arbitrators had exceeded their authority by even considering the barred class action claims in the arbitration proceeding. *Id.* at 145. Indeed, the *VMS* case is particularly instructive here,

because it establishes that a district court properly exercises its authority to enforce its prior injunction even *after* the merits of released class action claims have been addressed in arbitration.

D. PETITIONER'S REMAINING ARGUMENTS LACK MERIT

In her struggle to create an unsettled issue of law where none exists, Petitioner argues that Ninth Circuit's decision renders Section 12(d) of the NASD Code of Arbitration Procedure "null and void." This is preposterous. As Petitioner acknowledges, Section 12(d) was not enacted until *after* the orders in question here were issued.[8] Thus, the procedures and deadlines delineated in Section 12(d) did not apply to, and were not violated by, Shearson's conduct. Its applicability is not, and never has been, an issue in this case. In any event, the Ninth Circuit's decision is completely consistent with Section 12(d), which expressly provides that a party who believes claims encompassed by a class action are improperly being pursued in arbitration "may elect . . . to petition the court with jurisdiction over the putative or certified class action to resolve such disputes." Section 12(d).

Finally, Petitioner complains that the Ninth Circuit's decision is "unfair," because it allows a party who submits a case to arbitration to remove the matter to a

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[8] Because Section 12(d) was not effective until *October*, 1992, it would have been literally impossible for Shearson to have complied with that rule within ten days of the arbitration panel's *January*, 1992 notice referring the matter to an arbitration panel. Petition, at 43 n.8.

judicial forum if the arbitration does not go in its favor. Petition, at 44. She suggests that such an outcome was condemned in *Halley Optical Corp. v. Jagar Int'l Marketing Corp.*, 752 F. Supp. 638, 639-40 (S.D.N.Y. 1990).

That result has been approved in other cases (*see, e.g., PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 512-14 (3d Cir. 1990); *In re VMS Securities Litigation*, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd*, 21 F.3d 139 (7th Cir. 1994)), but that is not what happened here. In *Halley*, a defendant moved to vacate an unfavorable arbitration award. Here, the arbitrators have never ruled, favorably or unfavorably, on Petitioner's Stamford Towers and Radisson Plaza claims. Thus, Shearson did not go to the district court to forum shop with the benefit of hindsight, as Petitioner suggests. Indeed, the only thing "unfair" about this case is that Shearson, who paid millions to finally settle all claims regarding Radisson Plaza and Stamford Towers, has been forced to face them again in arbitration by Petitioner, who cashed Shearson's settlement checks in exchange for her release of these claims. Nor is it fair for Shearson to undergo the process of review by this Court, when all Petitioner seeks is a chance to have her claims precluded by a different forum.

E. THE SETTLEMENT NOTICES SATISFIED CONSTITUTIONAL REQUIREMENTS

Finally, Petitioner complains that the court below erroneously ruled that the settlement notices she received adequately informed her of the consequences of remaining a class member, as required by the Fifth Amendment to the Constitution. But this is a fact-specific dispute over

the adequacy of information in a particular notice. It does not present a question of interest to anyone other than Petitioner. Thus, it is not an appropriate issue for review by the Court.

Moreover, it is well-settled that the notice given to class members for the approval of a class settlement need only fairly apprise them of the subject matter of the suit, the proposed terms of the settlement, and their opportunity to be heard. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977). Accordingly, the notice may contain only a "very general description" of the proposed settlement. *Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). As stated in *Bennett v. Behring Corp.*, 96 F.R.D. 343 (S.D. Fla. 1982), "[i]t is not the function of the settlement notice to fully inform the class of all the details of the settlement, but merely to put class members on notice of the general parameters of the settlement and to inform them of where information as to the specifics may be obtained." *See also Grunin*, 513 F.2d at 122.

This is exactly what was provided by the settlement notices here. As Petitioner concedes, the court-approved notices in question generally described the litigation, listed the causes of action in the complaints, stated that those claims *and others* would be dismissed, advised Petitioner of her options with respect to remaining a class member, invited her to examine the full settlement agreements, and gave her the opportunity to consult with class counsel or her own lawyer. Finally, the notices provided the dates and times of the settlement hearings, and

informed Petitioner of her right to appear at the hearings or object to the settlements.

Petitioner supports her claim that the class notices were inadequate by misquoting those notices. As noted in the Opposition of Respondents and Plaintiffs' Class Counsel to Petition for Writ of Certiorari, Petitioner selectively fails to quote the language in both notices describing the preclusive effects of remaining a class member, and misquotes the language she does cite to create the impression that the description of the claims being released was narrower than the notices actually provided. *See* Class Counsel's Opposition, at 2-4.

Petitioner also glosses over her own failure to review the complete *Sullivan* and *Hartley* settlement agreements. Where, as here, a class notice satisfies due process requirements, class members have a duty to ascertain any additional facts necessary to their decision to opt out or accept the benefits of the settlement. *In re Four Seasons Securities Laws Litigation*, 525 F.2d 500, 503 (10th Cir. 1975) (party who made no effort to examine available court files "cannot now be heard to complain that he did not know what they would have revealed."). "Class members are not expected to rely upon the notices as a complete source of settlement information." *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). Petitioner could easily have obtained more information, including the entire Settlement Agreements containing the detailed language of the class members' release of claims, had she taken the time to do so.

The notices provided in *Sullivan* and *Hartley* were adequate and satisfied constitutional due process requirements.

Petitioner cannot blame her failure to understand the implications of these settlements on any defect in the notices themselves.

CONCLUSION

There is no reason for this Court to review this case, which presents neither a conflict in decisions, nor any substantial federal question. The Petition should be denied.

Respectfully Submitted,

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January 27, 1995.